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No. 582

In the

Supreme Court of the United States

OCTOBER TERM, 1955

TIDEWATER ASSOCIATED OIL COMPANY, a corporation,
Petitioner,

vs.

VANCE W. WILLIAMS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH DISTRICT

EDW. S. FRANKLIN,
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603 Central Building
Seattle 4, Washington.

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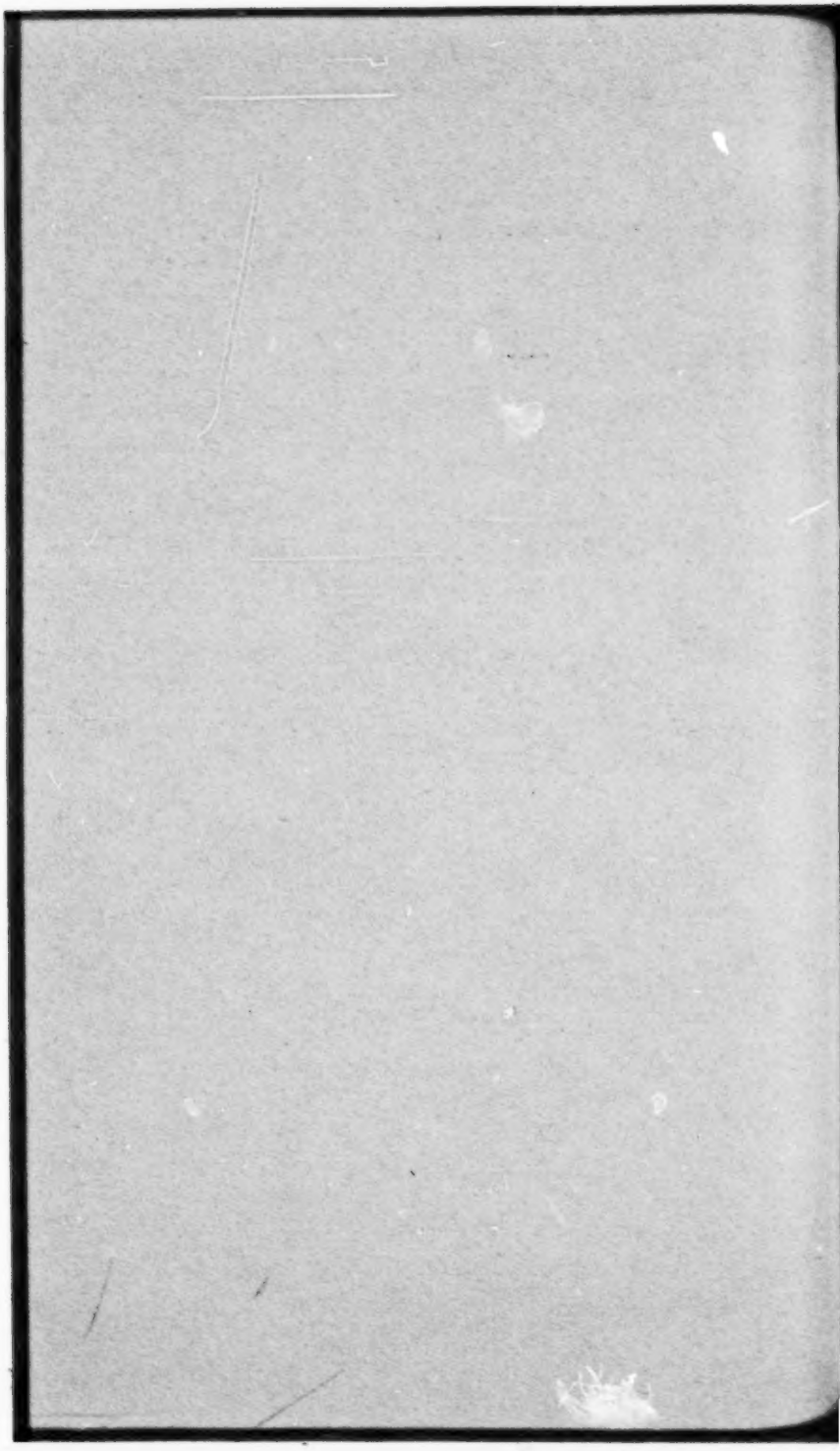

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IN THE

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TIDEWATER ASSOCIATED OIL COMPANY, a corporation, *Petitioner,*

vs.

VANCE W. WILLIAMS

No. .....

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH DISTRICT

Petitioner, Tidewater Associated Oil Company, a corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled cause on November 25, 1955.

OPINIONS BELOW

The District Court for the Western District of Washington, Northern Division, rendered a written opinion in the lower court which is reported in 125 F. Supp. 675. The opinion of the Court of Appeal for the Ninth Circuit has not been reported. Both opinions are printed in the Appendix hereto.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 25, 1955. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED

Is a seaman who brings a personal injury action against his employer both upon the grounds of unseaworthiness under the general maritime law and upon the additional grounds of negligence, under the Jones Act, required to elect in advance of trial upon which ground he will proceed.

STATUTE INVOLVED

The statutory provision involved is 46 U.S.C. Section 688 (commonly known as the Jones Act) reading as follows:

> "Recovery for injury to or death of seaman.
>
> "Any seaman who shall suffer personal injury in the course of his employment may, *at his election,* maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, §20, 38 Stat. 1185; June 5, 1920, c. 250, §33, 41 Stat. 1007." (Italics ours)

STATEMENT

Williams sued petitioner, his employer, for damages for personal injuries, both on the grounds of unseaworthiness and negligence in an action instituted in the United States District Court, for the Western District of Washington, Northern Division, on the law side of the court before a jury. Petitioner moved in advance of trial that Williams be required to elect as to whether he would proceed on the grounds of negligence or unseaworthiness as required by 46 U.S.C. Section 688, *supra*. The motion was granted and Williams elected to proceed on the grounds of negligence under the Jones Act rather than unseaworthiness (Pre-Trial Order, R. 8).

The jury returned a verdict in petitioner's favor in the negligence action. Williams moved for a new trial on the grounds *inter alia* that the District Court committed error in requiring the seaman to make such election. The District Judge denied the motion for new trial (R. 12; 125 F.Supp. 675). Williams appealed to the United States Court of Appeals for the Ninth Circuit which sustained his contention that no election of remedies was required between negligence and unseaworthiness and reversed the District Judge and remanded the matter to the District Court to give Williams a trial by jury on the issue of unseaworthiness.

REASONS FOR GRANTING THE WRIT

The decision of the Court below is in conflict with the following cases decided by this Court:

Panama Railroad v Johnson, 264 U.S. 375, 68 L.ed. 748;

Engel v. Davenport, 271 U.S. 33, 70 L.ed. 813;

Plamals v. The Pinar Del Rio, 277 U.S. 150, 72 L.ed. 827;

Pacific Steamship Company v. Peterson, 278 U.S. 130, 73 L.ed. 220;

Lindgren v. United States, 281 U.S. 38, 74 L.ed. 686.

The question presented is of importance in the interpretation of the Jones Act, and because of the vacillating views of the various circuits as to the necessity of requiring such election to be made.

Prior to the passage of the Jones Act, seamen who suffered personal injuries in service of the ship had only a cause of action against the shipowner or vessel for indemnity because of unseaworthiness of the vessel or its appliances. General maritime law did not afford a remedy to seamen for injuries caused by the negligence of the Master or any crew member of the vessel nor did it furnish a death action in Admiralty for unseaworthiness. *The Osceola,* 189 U.S. 158, 17 L.ed. 760.

The seaman enforced his right of indemnity for unseaworthiness in the admiralty courts either *in personam* or *in rem;* in addition the seaman had the right to enforce his claim for indemnity in the common law courts by virtue of the "saving to suitors" clause of the Judiciary Act of 1789 (1 Stat. at L. 76, 77, Chap. 20) "saving to suitors a common law remedy where the common law was competent to give it." Thus, prior to the enactment of the Jones Act in 1920, the common law courts of the state, and the law side of the Federal Court in diversity cases where available forum to sea-

men to litigate a claim for indemnity for unseaworthiness in addition to the admiralty forum.

The Jones Act created a new and substantive and alternative cause of action in favor of the seamen based upon negligence and to be enforced "at his election." In the cited cases this Court has laid down the rule that the elective provision of the Jones Act is an election between the alternative and inconsistent remedies for an injury accorded by the general maritime law and the newly-created remedy created by the Jones Act for negligence.

As stated by this Court in the case of *Pacific Steamship Company v. Peterson, supra,*

> "The right to recover compensatory damages under the new rule for injuries caused by negligence is, however, an alternative of the right to recover indemnity under the old rules on the ground that the injuries were occasioned by unseaworthiness; and it is between these two inconsistent remedies for an injury, both grounded on tort, that we think an election is to be made under the maritime law as modified by the statute. * * * "

The Ninth Circuit disregarding and not even mentioning this Court's prior consistent interpretations of the election phrase in the Jones Act erroneously concluded that

> "the phrase 'at his election' could be construed to mean that the election to sue for negligence was an addition to his other remedies under the general maritime law. We think under the rule of liberal construction in the seamen's favor that this was the Congressional intent."

Such interpretation was sought to be justified upon the

alleged grounds of the necessity of a liberal construction of the Jones Act in the seamen's favor. We feel that the announced judicial intent of seeking to favor the seamen as litigant does not justify that Court's completely ignoring the Congresional mandate of the Jones Act compelling such election and the consistent views of this Court as revealed by the cited cases in interpreting the statutory phrase as requiring an election between an action based upon unseaworthiness and negligence.

The opinion of the Circuit Court below states that:

> "This is a diversity proceeding on the 'civil' side of the District Court rather than the 'admiralty' side."

The record does not support this conclusion. Neither the original complaint nor the pretrial order (R. 3 to 8 inc.) allege diversity of citizenship. Jurisdiction in the United States District Court was rested upon 28 U.S.C. Section 1331. This conclusion of the Circuit Court was clearly erroneous.

The Third Circuit, incorrectly reading the litigation culminating in the case of *Baltimore Steamship Company v. Phillips,* 274 U.S. 316, 70 L.ed. 1069, in a series of cases beginning with *Branic v. Wheeling Steel Corporation,* 152 F.(2d) 887, *German v. Carnegie-Illinois Steel Company,* 156 F.(2d) 977, and *McCarthy v. American Eastern Corporation,* 175 F.(2d) 724, has recently permitted the commingling and concurrent enforcement of seamen's actions for negligence and unseaworthiness in a single action without the necessity of an election of remedies for the announced reason that if the seamen made an improper election it might prove disadvantageous to him, a consideration obviously of

Congressional rather than judicial concern. The Third Circuit has interpreted the elective phrase of the Jones Act as requiring "an election of remedies as between a suit in admiralty and a civil action." *McCarthy v. American Eastern Corporation, supra.*

Williams' counsel pressed vigorously, though unsuccessfully, in the argument in the Circuit Court below for the adoption of the Third Circuit view. Thus, the Ninth and the Third Circuits are in conflict as to the precise interpretation to be given the elective phrase of the Jones Act, and both Circuits' opinions are in conflict with the opinions of this Court, as enunciated in the cited cases, in dispensing with the necessity of an election.

The Second Circuit in the case of *McGhee v. United States of America,* 165 F.(2d) 287, and *Skolar v. Lehigh Valley R. R. Co.,* 60 F.(2d) 893, required an election to be exercised by the seamen in advance of trial but in a recent case, *Balado v. Lykes Bros. Steamship Company,* 179 F.(2d) 943, adopted the erroneous rule of the Third Circuit, and relied upon the Third Circuit Court's interpretation of this Court's opinion in the *Baltimore Steamship Company, supra.* A careful reading of the entire litigation involved in the *Baltimore* case will establish that that decision was not concerned with the question of the necessity of an election being made in advance of trial by a seaman suing his employer, both for unseaworthiness and negligence under the Jones Act in the same action. It concerned only the questions of *res adjudicata* in a negligence action.

The Fifth Circuit, in the case of *Smith v. Lykes*

Brothers-Ripley S. S. Co., 105 F.(2d) 604, ruled that an election was required. Its later opinion, *Sanford v. Caswell*, 200 F.(2d) 830, may have modified its earlier views.

A review of the various Circuits indicates the confusion and conflicting views prevailing as to the necessity and elements of the statutory election prescribed by the Jones Act.

To interpret the phrase "at his election" as did the Ninth Circuit below is to render the statutory phrase utterly meaningless. Requiring an election between the substantive rights of unseaworthiness and negligence places no unfair burden on seamen litigants.

In considering the elective phrase in the Jones Act, Justice Van de Vanter in the *Panama & Pacific Railway* case, *supra*, said:

> "There are many instances in the law where a person who is entitled to sue may choose between alternative measures of redress and mode of enforcement; and this has been true since before the Constitution."

We are aware of the fact that in the case of *McCarthy v. American Eastern Corporation, supra*, certiorari was denied, 338 U.S. 868, 94 L.ed. 532. However, we feel that the confusion of the various circuits on this question and their failure to follow the decided cases of this Court justify the filing of a petition in this case.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EDW. S. FRANKLIN,
Attorney for Petitioner.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

VANCE W. WILLIAMS, *Appellant*, vs. TIDE WATER ASSOCIATED OIL COMPANY, a corporation, *Appellee*.	No. 14,677 Nov. 25, 1955

Appeal from the United States District Court for the Western District of Washington, Northern Division

Before: DENMAN, Chief Judge, and HEALY and BONE, Circuit Judges.

Denman, Chief Judge:

Williams appeals from the district court's decision in a diversity case holding that the court lacked jurisdiction to entertain in a civil suit with a trial by jury, a sailor's cause of action against his employing owner of a tanker for her unseaworthiness[1] and one for negligence of his fellow employees[2] each seeking damages for injuries arising from the same facts. The lower court so decided[3] though the courts of appeal of the

[1] See The Osceola, 189 U.S. 158, 175 (1903); Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953); Seas Shipping Co., Inc. v. Sieracki, 328 U.S. 85 (1946).

[2] 46 U.S.C. § 688.

[3] Williams v. Tide Water Associated Oil Co., 125 F. Supp. 675 (W.D. Wash. 1954). The district judge, though discussing the merits of the contention that two causes of action could be joined in this action, held he was entitled not to consider them. This decision was stated to be based on alleged unanimous holdings in prior cases in his district court that they could not be joined. Cf. 125 F. Supp. 677. In this he ignored the contrary decision of Judge Fee sitting in that court, that they so could be joined. Lahde v. Theogennitor, 107 F. Supp. 664 (W.D. Wash. 1952), relying on the two Third Circuit cases herein considered. Judge Fee is none the less

First, Second, Third and Fifth Circuits hold such jurisdiction exists and no circuit now holds to the contrary. The First,[4] Third[5] and Fifth Circuits[6] permit the trial of both issues in the same case, and the Second Circuit after two decisions to the contrary[7] held that both contentions could be tried together.[8] So also is the practice in the United States District Courts in California,[9] many district courts elsewhere,[10] and in some of the state courts which have considered the question.[11]

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a judge of the district though sitting under a temporary designation. We do not agree that a district judge in such a situation is entitled to escape the burden of considering and deciding his litigants' contentions.

[4] Doucette v. Vincent, 194 F. 2d 834 (Cir. 1, 1952).

[5] Yates v. Dann, 223 F. 2d 64 (Cir. 3, 1955); McCarthy v. American Eastern Corp., 175 F. 2d 724 (Cir. 3), cert. denied, 338 U.S. 868 (1949), 50 Col. L. Rev. 1144 (1950); German v. Carnegia-Illinois Steel Corp., 156 F. 2d 977 (Cir. 3, 1946).

[6] Sanford v. Caswell, 200 F. 2d 830 (Cir. 5, 1953).

[7] McGhee v United States, 165 F. 2d 287, 290 (Cir. 2, 194[illegible]); Skolar v. Lehigh Valley R.R.. 60 F. 2d 893, 894 (Cir. 2, 1932).

[8] Balado v. Lykes Bros. S. Co., 179 F. 2d 943 (Cir. 2, 1[illegible]50). See also, Keen v. Overseas Tankship Corp., 194 F. 2d 515 (Cir. 2, 1952).

[9] Henz v. United States, 9 F.R.D. 291 (N.D. Calif. 1949); Thomsen v. The Dorene B, 91 F. Supp. 549 (S.D. Calif. 1950). The Thomsen case refused to follow Reed v. The Arkansas, 88 F. Supp. 993 (S.D. Calif. 1950) which was based on the now overruled Second Circuit decisions cited in note 7.

[10] Lahde v. The Theogennitor, 107 F. Supp. 664, 665 n. 3 (W.D. Wash. 1952); Boudoin v. Lykes Bros. S. S. Co., 112 F. Supp. 177 (E.D. La. 1953); Haywood v. Jones & Laughlin Steel Corp., 108 F. Supp. 661 (W.D. Pa. 1952); McLeod v. Union Barge Line Co., 95 F. Supp. 366 (W.D. Pa. 1951); Murphy v. American Barge Line Co., 93 F. Supp. 653 (W.D. Pa. 1950); Stalker v. Southeastern Oil Delaware, Inc., 103 F. Supp. 436 (D. Del. 1951); Erickson v. Shamrock Towing Co., Inc., 81 F. Supp. 850 (S.D. N.Y. 1948); Platt v. Chesapeake & Ohio Ry. Co., 82 F. Supp. 968 (N.D. Ohio 1948); Warren v. Weber & Heidenthaler, Inc., 1955 A.M.C. 1054 (D. Mass.); Hill v. Atlantic Navigation Co., 1954 A.M.C. 2150 (E.D. Va.).

[11] See Pearson v. Tidewater Associated Oil Co., 223 P. 2d 669 (Calif. App. 1950) adopting the view taken in Ramsey v. Oreb, 1949 A.M.C.

The district court in holding that both causes of action could not be tried by the jury ordered Williams to elect which issue should be tried. Williams contends that the court erred in so compelling him to elect before trial and that the case should be reversed so that the untried issues of unseaworthiness could be tried by a jury.

Since this is a diversity proceeding on the "civil" side of the district court rather than the "admiralty" side, Williams would be entitled to have the question of unseaworthiness tried by jury if the district court erred, as we think it did, in compelling him to elect to bring his action only under the Jones Act for negligence.

Regarding this diversity civil suit at common law and not in admiralty, the right to sue for unseaworthiness may be enforced by a common law *remedy* under the "saving to suitors" clause. 28 U.S.C. §1333. In this case, such a remedy would have been available in the state courts of Washington. See, e.g., Sandanger v. Carlisle Packing Co., 112 Wash. 480, 192 Pac. 1005 (1920), affd. sub. nom. Carlisle Packing Co. v. Sandan-

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1860 (Los Angeles County Superior Court) and rejecting that of Vargas v. Pope & Talbot, Inc., 1948 A.M.C. 904 (Los Angeles County Superior Court); Williams v. Steamship Mutual Underwriting Assn., 45 Wash. 2d 209, 273 P. 2d 803 (1954) adopting the view taken in Lewis v. Orion Shipping & Trading Co., Inc., 1953 A.M.C. 546 (Superior Court of King County, Wash.) and rejecting that of Boothby v. Washington Toll Bridge Authority, et al. 1954 A.M.C. 479 (Superior Court of King County, Wash.); Borgman v. Sword Line, Inc., 81 N.Y.S. 2d 445 (Sup. Ct. of N.Y. 1948).

The United States Supreme Court in Boudoin v. Lykes Bros. S. S. Co., Inc., 3484 U.S. 336 (1955) apparently assumed that a seaman could "base his claim for recovery both on negligence and on breach of the warranty of seaworthiness." See generally, 5 Stan. L. Rev. 814, 821-22 (1953).

ger, 259 U.S. 255 (1922); Williams v. Steamship Mutual Underwriting Assn., 45 Wash. 2d 209, 273 P.2d 803 (1954); Brown v. Inter-Coastal Fisheries, 34 Wash. 2d 48, 207 P.2d 1205 (1949); two of these having jury trials. Because of the diversity of citizenship here the United States District Court had jurisdiction under 28 U.S.C. §1332. An incident to the diversity jurisdiction based on the common law remedy saved to suitors by section 1333 is the right to jury trial under the Seventh Amendment and F.R.C.P. 38(a). See Doucette v. Vincent, 194 F.2d 834 (Cir. 1, 1952). Had unseaworthiness been the sole issue in this case the district court would have no power to convert this diversity civil suit into a proceeding in admiralty and deprive Williams of his right to a jury.

Furthermore, since Williams had his right in the State of Washington to trial by jury on the issue of unseaworthiness, if he had initiated his suit there, the steamship company, on diversity of citizenship, could have transferred it to the federal court. Then if the contention of the steamship company were valid, the mere diversity transfer would have deprived Williams of his jury. We cannot believe that by the diversity power such "give it and take it away" result can be effected.

The combination of two causes of action for the same injury is allowed under the codes of most states,[12] and the Federal Rules of Civil Procedure provide in Rule 8(e)(2):

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[12] See, e.g., Wilkerson v. Seib, 20 Cal. 2d 556, 127 P. 2d 904 (1942); Lewis v. Miller, 197 Ore. 354, 251 P. 2d 876 (1952); Jeffs v. Stephenson, 9 Wash. 2d 336, 114 P. 2d 987 (1941).

> "A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses . . . A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both . . ."

The question here is whether Congress intended in enacting the Jones Act, in which the following language is used:

> "Any seaman who shall suffer personal injury in the course of his employment may, *at his election,* maintain an action for damages at law. . . .",

to prohibit the seaman from combining in one suit his Jones Act cause of action for negligence and his cause of action under general maritime law for unseaworthiness. In interpreting this legislation for seamen we are governed by decisions of the Supreme Court indicating that legislation affecting them should be liberally construed in their favor. See, e.g., Socony-Vacuum Co. v. Smith, 305 U.S. 424 (1938); Warner v. Goltra, 293 U.S. 155, 156-157 (1934); Cortes v. Baltimore Insular Line, 287 U.S. 367, 375 (1932). The phrase "at his election" could be construed to mean that the election to sue for negligence was an addition to his other remedies under general maritime law. We think, under the rule of liberal construction in the seaman's favor, that this was the congressional intent. Obviously, the seaman can have but a single *recovery* on one or the other contention.

Williams contends that he should have a new trial on his Jones Act cause of action also. He argues that "in a seaman's case where the negligence of the de-

fendant has been established a verdict by the jury for the defendant cannot stand under the rule of comparative negligence, notwithstanding the seaman's contributory negligence," and "where the presence of oil on the deck could only result from negligence as the violation of a standing order, the court's instruction that the plaintiff must also prove that the defendant had notice with an opportunity to correct the oily condition was prejudicial error." Neither of these contentions has merit. The first assumes that negligence had been proved. Without a showing of knowledge of an oil spill on the part of the tanker's officers or crew, as required by the court's instruction, there would be no negligence. The crewman who spilled the oil on the deck could have failed to notice it. We cannot say that as a matter of law such failure would constitute negligence.

The judgment is reversed and the district court ordered to entertain Williams' contention that his injuries were caused by the unseaworthiness of the vessel with his right to trial by jury.

(Endorsed:) Opinion. Filed Nov. 25, 1955.

Paul P. O'Brien, Clerk.

APPENDIX B

VANCE W. WILLIAMS, *Plaintiff*,

vs.

TIDEWATER ASSOCIATED OIL COMPANY, a corporation, *Defendant*.

No. 3395

November 16, 1954

United States District Court
W.D. Washington, N.D.
(125 F.Supp. 675)

LEVINSON & FRIEDMAN, Seattle, Wash., for plaintiff.

BOGLE, BOGLE & GATES and EDW. S. FRANKLIN, Seattle, Wash., for defendant.

BOLDT, District Judge.

In a complaint labeled "In Law" and containing a jury trial demand, plaintiff sought recovery for personal injuries alleged to have been sustained from a fall on the deck of the defendant's tanker S.S. Tidewater. At the time plaintiff seaman and others of the crew were carrying a large hose across the deck. It was alleged that defendant was negligent in failing to have the deck painted with "non skid" paint and in permitting an oil spill to be and remain on the deck at the point of plaintiff's fall. The verdict was in favor of defendant and plaintiff has moved for a new trial on three general grounds: (a) insufficiency of the evidence to support the verdict; (b) error in the instructions; and (c) the action of the court in refusing plaintiff's request to include in the issues stated in the pretrial

order a claim of non-negligent unseaworthiness as a basis for liability.

The first two grounds of the motion for new trial were overrruled at the conclusion of the argument thereon for reasons stated at that time. Plaintiff's motion to vacate the judgment entered on the verdict has been heard, considered and denied. The only matter remaining to be considered and decided is the third general ground of plaintiff's motion for a new trial which is concerned with the election to be made under the Jones Act, 46 U.S.C.A. §688, by an injured seaman.

The precise question now presented has never been directly considered or decided by the Supreme Court but language used in various of the cited opinions is consistent with and inferentially supports the rule hereinafter stated and long established in this District. *Panama R. R. Co. v. Johnson,* 264 U.S. 375, 44 S.Ct. 391, 68 L.ed. 748; *Engel v. Davenport,* 271 U.S. 33, 46 S.Ct. 410, 70 L.ed. 813, quoted in *Hammond Lbr. Co. v. Sandin,* 9 Cir., 1927, 17 F.2d 760; *Baltimore S. S. Co. v. Phillips,* 274 U.S. 316, 47 S.Ct. 600, 71 L.ed. 1069; *Plamals v. The Pinar Del Rio,* 277 U.S. 151, 48 S.Ct. 457, 72 L.ed. 827; *Pacific S. S. Co. v. Peterson,* 278 U.S. 130, 49 S.Ct. 75, 73 L.ed. 220; *Lindgren v. U. S.,* 281 U.S. 38, 50 S.Ct. 207, 74 L.ed. 686; *The Arizona v. Anelich,* 1936, 298 U.S. 110, 56 S.Ct. 573, 80 L.ed. 989; *Beadle v. Spencer,* 298 U.S. 124, 56 S.Ct. 712, 80 L.ed. 1082; *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 66 S.Ct. 872, 90 L.ed. 1099.

The contrary holding of the Third Circuit in *McCarthy v. American Eastern Corp.,* 175 F.2d 724, certiorari denied 338 U.S. 868, 70 S.Ct. 144, 94 L.ed. 532

and rehearing denied 338 U.S. 939, 70 S.Ct. 343, 94 L.ed. 579, followed by the Second Circuit in *Balado v. Lykes Bros. S. S. Co.*, 179 F.2d 943, and by the California Northern District Court in *Henz v. U. S. D. C.*, 9 F.R.D. 291, 1949 A.M.C. 1769 (*contra*: Southern District of California in *Reed v. The Steamship Arkansas*, D.C., 88 F.Supp. 993, 1950 A.M.C. 1410), is expressly predicated upon construction of the Supreme Court opinion in *Baltimore S. S. Co. v. Phillips, supra.*

The Baltimore case does not deal directly with an election under the Jones Act and in my opinion there is no language or circumstance in that case requiring the view thereof originally taken by the Second Circuit Court. In his first action, a libel in admiralty, the injured seaman Phillips asserted liability because of alleged negligence in various particulars and because of the alleged unseaworthiness of the vessel on which he was employed. The trial court awarded maintenance and cure but found against Phillips on all grounds asserted for personal injury liability. Thereafter Phillips brought a new action expressly asserting liability under the Jones Act on particulars of negligence not alleged in the first action. *Res adjudicata* was urged as a defense to the second action and sustained by the Supreme Court. Under those circumstances all that the Supreme Court had before it for decision was the simple question whether a plaintiff claiming for a single injury who has had a trial, whether in admiralty or law, upon his claims of negligence in certain particulars, may, after an adjudication against him, bring a new action, either in admiralty or in law, and have a further trial on new and additional claims of negli-

gence. There is nothing in the Supreme Court language deciding that question in the negative which purports to define the character of the election specifically referred to in the Jones Act or which directly or necessarily supports the view of such election adopted in the Second and Third Circuits solely on the basis of the Baltimore decision and overruling previous decisions in harmony with the rule in this District.

In my opinion the wording of the Jones Act, read against its historical background, plainly provides for election by the seaman in accordance with the rule applied in this District.

In several unpublished decisions the judges of this District have uniformly held that a seaman suing to recover damages for personal injuries must elect whether to proceed either by action at law grounded in negligence with a right to jury trial, or in admiralty with non-jury trial based on unseaworthiness whether negligently caused or not. *Kildall v. U. S.* (W.D. Wash. No. 15761, Judge John C. Bowen); *Niels Nielsen v. Pacific-Atlantic S. S. Co.* (W.D Wash. No. 2526, Judge Lloyd L. Black); and *David B. Johnston v. Olympic S. S. Co.* (W.D. Wash. No. 2803, Judge William J. Lindberg), are among many decisions in this District to such effect.

It would be inappropriate for the present judge to reexamine the question in the absence of exceptional circumstances and the third ground of plaintiff's motion ought to be denied on that basis alone.

> "* * * One judge will not review the rulings of another in the same court." *Taylor v. Decatur Mineral & Land Co.*, C.C.N.D. Ala., N.D. 1901, 112 F. 449.

"Judges of coordinate jurisdiction should not ordinarily overrule decisions of their associates based on the same set of facts, unless required by higher authority." *U. S. v. Firman,* D.C.W.D. Pa. 1951, 98 F.Supp. 944, 946.

Plaintiff's motion for new trial is denied on all grounds and judgment of dismissal may be entered.

56/26

FILED
JAN 16 1956
HAROLD B. WILLEY, Clerk

No. 582

In the

Supreme Court of the United States

OCTOBER TERM, 1955

TIDEWATER ASSOCIATED OIL COMPANY, a corporation,
Petitioner,

vs.

VANCE W. WILLIAMS

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TIDEWATER ASSOCIATED OIL COMPANY, a corporation, *Petitioner*, vs. VANCE W. WILLIAMS	No. 582

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Tidewater Associated Oil Company, a corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled cause on November 25, 1955.

OPINIONS BELOW

The opinion of the United States Court of Appeals and that of the District Court are correctly set forth in the appendix to the petition.

JURISDICTION

The jurisdiction ~~requests~~ REQUISITES are adequately set forth in the petition.

QUESTION PRESENTED

The statement of the question presented as set forth in the petition is correct.

STATUTE INVOLVED

The statutory provision involved, 46 U.S.C.A., Section 688, commonly known as the Jones Act, is correctly set forth in the petition.

STATEMENT

The statement of facts and the manner in which the question arose is adequately and correctly set forth in the petition.

ARGUMENT

I. There Is No Conflict in the Decision of the Court Below with Decisions of This Court or Other Circuit Courts of Appeal.

In all cases where the question has been presented to the circuit courts, the decisions have been uniform and the same as that of the court below.

Respondent's claim derives from two sources, the Jones Act, 46 U.S.C.A., Section 688, which gives a right of action for negligence, and the General Maritime Law, which gives a right of action for unseaworthiness. *Branic v. Wheeling Steel Corporation* (3 C.C.A.) 152 F.(2d) 887, 889-890. This case was, therefore, an action under the maritime law as modified or supplemented by the Jones Act.

While the question of election has been involved in a substantial number of cases, only two circuit courts have had this issue directly before them as such and passed upon it. They are the United States Circuit Court of Appeals for the Second Circuit and the Third Circuit. They are *German v. Carnegie-Illinois Steel Co.* (3 C.C.A.) 156 F.(2d) 977; *McCarthy v. American Eastern Corporation* (3 C.C.A.) 175 F.(2d) 724, *cert.*

den., 338 U.S. 868; and *Balado v. Lykes Bros. Steamship Co.* (2 C.C.A.) 179 F.(2d) 943. Both have decided that to compel an "election" before trial between negligence under the Jones Act and unseaworthiness under the General Maritime Law constitutes prejudicial error.

When the matter was first presented to the Third Circuit in *German v. Carnegie-Illinois Steel Co.* (*supra*), the court held that the requirement by the trial court, that the plaintiff elect between a cause of action based upon negligence under the Jones Act and one upon unseaworthiness was reversible error and sent the case back for a new trial after a verdict for the defendant. The question again came before the Third Circuit in *McCarthy v. American Eastern Corporation* (*supra*). The court then had before it the validity of a verdict in favor of the plaintiff on a claim which had as its basis both the unseaworthiness of the vessel and the negligence of the crew. The basis of the appeal was the alleged error in submitting both of these issues to the jury. The Third Circuit referred to the fact that although this question had been decided adversely to the appellant on one of its prior decisions (*German v. Carnegie-Illinois Steel Co., supra*) in view of the insistent argument that its prior decision ran counter to the decisions of the Supreme Court of the United States, the court reviewed its prior case and amplified the reasons which led to its conclusion. The court discussed the arguments presented and reaffirmed its prior decision as being supported both by the decisions of this court and in accord with the traditional attitude of the courts toward the rights of seamen. A petition for a

writ of certiorari, seeking to review this situation, was filed in this court and denied (338 U.S. 868) as well as was the petition for rehearing of this court's action.

The Circuit Court of Appeals for the Second Circuit had originally used language in the cases of *Skolar v. Lehigh Valley R.R. Co.*, 60 F.(2d) 893, and *McGhee v. United States of America*, 165 F.(2d) 287, which gave support to the proposition that an election between negligence and unseaworthiness would be required. These are undoubtedly the cases upon which petitioner relies when he states that there are vacillating views of the various circuits. The Second Circuit had occasion to review both the *Skolar* and *McGhee* cases in the case of *Balado v. Lykes Bros. Steamship Co.*, 179 F.(2d) 943, and reversed its prior holdings in the *Skolar* and *McGhee* cases, *supra*. The *Balado* case was originally presented upon the theory of negligence and unseaworthiness. In the charge to the jury, however, the trial court removed the issue of unseaworthiness from the jury. The question was, therefore, squarely before the Second Circuit as to whether these two issues could be presented in the same proceeding. The circuit court held that they could and in its decision refers to its prior decisions and reverses its prior rulings. We quote from page 945 as follows:

> "The question whether the plaintiff must elect whether to claim damages under the Jones Act for negligence, or under maritime law for unseaworthiness before submitting his claims to a jury may perhaps be raised on a new trial because of certain dicta in our decisions in *Skolar v. Lehigh Valley R.R. Co.*, 60 F.(2d) 893, 894, and *McGhee v. United States*, 165 F.(2d) 287. On this matter of election of remedies we find the analysis by Judge Maris in

the opinion of the Supreme Court in *Baltimore S.S. Co. v. Phillips,* 274 U.S. 316, 47 S.Ct. 600, 71 L.Ed. 1069, most persuasive. In accordance with the view there expressed we think there will be no necessity for such an election in the future. In our opinion, election is required by the Jones Act only between a trial by jury and a suit in admiralty. Here that election was made when the plaintiff brought his action at law under the Jones Act. On the evidence before us we can discover no proof of negligence on the part of the defendant which caused any injury to the plaintiff. If the plaintiff can sustain any claim for damages it will be found on proof that the ship was unseaworthy when she sailed, and not on negligence of the officers and crew."

While there have been no other circuit court cases which have passed upon the issue directly as presented here, all other federal circuits which have touched upon the question have assumed that an action for damages based on unseaworthiness under the maritime law and negligence under the Jones Act could be joined under the one action. Such was the case in the Fifth Circuit in *Sanford v. Caswell,* 200 F.(2d) 830; *U.S.A. v. Smith, adm.,* 220 F.(2d) 548; and the First Circuit, *Doucette v. Vincent,* 194 F.(2d) 834.

In the case of *U.S.A. v. Smith, (supra)* the opening lines of the opinion are as follows:

> "*Richard T. Reeves, Ct. J.*: This action by the administrator for the benefit of the parents and dependents of Jeff Smith, deceased, was brought under the Jones Act, 46 U.S. Code 688, as well as under the admiralty law for unseaworthiness."

This court has also adopted a similar position in the

very recent case of *Boudoin v. Lykes Bros. Steamship Co.*, U.S.S. Ct., February, 1955, A.M.C. 488, 348 U.S. 336, 99 L.Ed. 354. Respondent frankly admits that the issue as presented here was not involved in that case. That case, however, assumes as did the Circuit Court of Appeals for the First and Fifth Circuits that a cause of action based on unseaworthiness and on negligence could be joined. We base this assumption upon the fact that no criticism or comment is made of such joinder. We quote the following opening portion of the opinion:

> "Mr. Justice Douglas delivered the opinion of the court:
>
> " 'This is a suit by an American seaman against the owner and operator of an ocean freighter, the *Mason Lykes,* upon which he was formerly employed. He based his claim for recovery both on negligence and on breach of the warranty of seaworthiness. The case was tried by the court upon waiver of jury. The district court found for the plaintiff, holding that the ship owner breached its warranty of seaworthiness and that its officers were negligent'."

The Supreme Court in reversing the Circuit Court and affirming the opinion of the District Court found that there was sufficient evidence to support a cause of action for the breach of warranty of seaworthiness. Therefore, it was not necessary for them to reach the question of negligence. However, Mr. Justice Reed concurred in the result on the ground of the negligence of the ship's officers.

There are a few early district court cases and some in the state courts which hold a contrary opinion. However, subsequent and present decisions from these dis-

tricts and states are now in accord with the decisions of the federal appellate courts. They are referred to in the notes of the opinion of the court below.

There is no present conflict in the federal courts on this issue.

II. The Decision of the Court Below Is Clearly Correct.

Petitioner has asserted and was originally sustained by the district court that the phrase "at his election" as used in the Jones Act, 46 U.S. Code 688, requires the seaman to elect between theories of liability, that is to say, that it requires the seaman to choose whether he will assert liability under the theory of unseaworthiness under the old rules or under the theory of negligence under the new rules; that this statute forecloses the assertion of liability upon both grounds in the same action. This proposition on its face appears to be so unreasonable as to make it improbable.

What then is the election contemplated by the Jones Act? One aspect is readily considered, namely the seaman's freedom of choice to proceed in admiralty, *in rem* if desired, rather than at law. But there is a second aspect to the problem.

While the Jones Act created and incorporated into the maritime law new rules of liability for injuries resulting from negligence, it did not create a new *cause of action* with respect to such injuries. In other words, recovery of damages based upon negligence was not intended to be cumulative to recovery in damages based upon unseaworthiness. Congress was simply providing an additional basis of liability upon which a single recovery of damages could be predicated. The operative

facts, whether constituting unseaworthiness or negligence, or both combined, are common to both and *constitute but a single legal wrong resulting in a single cause of action.* This, in plain terms, means that a seaman is foreclosed from prosecuting from a judgment on the merits, two actions based upon the same legal wrong, one on the theory of negligence and the other on the theory of unseaworthiness. If the seaman chooses to proceed to judgment on any single theory of liability, he may not thereafter proceed again on another theory since his *single cause of action* once litigated on whatever theory is extinguished at the moment of judgment.

The foregoing is consonant with the established principles of *res judicata. Baltimore S.S. Co. v. Phillips,* 274 U.S. 316, 71 L.Ed. 1069. An examination of the *Phillips* case served to demonstrate that, precisely for this reason, a seaman cannot adequately enforce his rights under the maritime law unless he proceeds as the plaintiff here attempted to proceed. That is to say, unless he asserts *in the same action* all of the grounds upon which he expects a judgment in his favor. In that case the seaman had prosecuted to judgment (the judgment being adverse to the seaman) a libel in admiralty against a vessel owner for damages resulting from personal injuries allegedly caused:

> "by negligence in failing to provide a safe place in which to work and to use reasonable care to avoid striking respondent, and by unseaworthiness and insufficiency of gear and tackle employed on the vessel." (274 U.S. p. 318)

Thereafter he brought a second action to recover

damages for the same injury, based upon the negligent operation of the same appliances by the ship's crew. The Supreme Court held that the judgment on the merits of the first case operated as an absolute bar between the same parties since the second suit was upon the same cause of action as the first one. The court stated as follows:

> (U.S. p. 319) "The affect of a judgment or decree as *res adjudicata* depends upon whether the second action or suit is upon the same or a different cause of action. If upon the same cause of action, the judgment or decree on the merits in the first case is an absolute bar to the subsequent action or suit between the same parties or those in privity with them, not only in respect of every matter which was actually offered and received to sustain the demand, but also *as to every ground of recovery which might have been presented* * * *."
>
> (U.S. p. 320) *"He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible."* (Italics supplied)

The Supreme Court pointed out that the first *Phillips* case was tried under the rule of the *Osceola,* 189 U.S. 158, 47 L.Ed. 760, that is, under the theory of unseaworthiness alone, and that the court and counsel had misinterpreted the effect of the Jones Act in that case and apparently believed that a cause of action for negligence could not be maintained. The *Phillips* case is direct authority on the precise question before this court. We quote from the court's opinion as follows:

(U.S. p. 324) "It follows that here both the libel and the subsequent action were prosecuted under the maritime law, and every ground of recovery *open to respondent in the second case, was equally open to him in the first.* But evidently in the first proceeding *both court and counsel* misinterpreted the effect of Sec. 33, and proceeded upon the erroneous theory, that in admiralty the rule laid down in the *Osceola,* 189 U.S. 158, 175: 'That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negilgence or accident,' was still in force. Otherwise, it is quite apparent from the language of the opinion that an amendment would have been sought and allowed, pleading the ground of negligence afterwards set up in the second action. *Nevertheless, the cause of action was one and indivisible* and the erroneous conclusion to the contrary cannot have the effect of depriving the defendants in the second action of their right to rely upon the plea of *res judicata.* Plaintiff's claim for damages having been submitted and passed upon, the effect of the judgment in the admiralty case as a bar is the same whether resting upon an erroneous view of the law or not." (Italics supplied)

It follows, therefore, that if the seaman recovers damages under the old rules on the ground that his injuries were occasioned by unseaworthiness he may not thereafter recover damages under the new rules on the ground that his injuries were caused by negligence.

This does not mean that he cannot proceed on both grounds in the same action, for no matter whether the injuries were occasioned by unseaworthiness or by neg-

ligence, or both combined, there is but a single legal wrong for which he will recover one indemnity by way of compensatory damages. The crux of the matter is that plaintiff's right to assert both grounds of liability at law does not stem exclusively from the Jones Act. It derives primarily from the principles reviewed in the *Phillips* case, *supra,* considered in conjunction with the rules, that liability for unseaworthiness may be asserted on the law side of the court without encroachment upon the admiralty jurisdiction.

At the time of the passage of the Jones Act it was the established doctrine that liability for unseaworthiness was enforceable on the law side of the court. Consistent with the principles reviewed in the *Phillips* case, *supra,* Congress in creating the new rules of liability for the benefit of seamen simply supplemented the existing maritime law by providing that in such action all of the prescribed railway acts shall apply. By this provision, the new rules were incorporated into and became an integral part of the maritime law, and by it, the seaman was left free to avail himself of the old rules of liability as well as the new, *provided both are asserted in the same action.*

Petitioner relies heavily on the language of *Pacific S.S. Co. v. Peterson,* 278 U.S. 130, 73 L.Ed. 220, and quotes a portion of that opinion in support of his position. We direct the court's attention to the following language in the same opinion which recognizes that whether the cause of action be based on unseaworthiness or negligence there is but a single invasion of his primary right of bodily safety:

" * * * Unseaworthiness, as is well understood,

embraces certain species of negligence; while the statute includes several additional species not embraced in that term. *But whether or not the seaman's injuries were occasioned by the unseaworthiness of the vessel or by the negligence of the master or members of the crew, or both combined, there is but a single wrongful invasion of his primary right of bodily safety and but a single legal wrong* (*Baltimore S.S. Co. v. Phillips*, 274 U.S. 321, 71 L.Ed. 1972, 42 Sup. Ct. Rep. 600) *for which he is entitled to but one indemnity by way of compensatory damages.*" (Italics supplied)

Under the foregoing it is evident that where the operative facts constituting the seaman's cause of action for damages tend to establish both negligence and unseaworthiness, the seaman is not merely privileged but bound by both bases of liability unless he wishes to run the risk of being deprived of relief altogether. It is seldom possible to predict in advance whether the proofs adduced at trial will sustain one or other basis of liability, and it is never possible to foretell which the jury will adopt and which it might reject. To impose upon the seaman the type of "election" contended for by the petitioner, and ordered by the trial court, would be to force upon the seaman a rule which is supported neither in logic, in reason, nor in policy, and which would seriously hamper the enforcement of a seaman's rights.

To read the act in the manner contended for by the petitioner would be not merely to construe narrowly a species of legislation remedial in character, intended for the benefit and protection of seamen who are peculiarly the wards of admiralty, but to do violence to legislation whose provisions are calculated to enlarge and

not to narrow the rights afforded to seamen. Such remedial legislation is always to be construed liberally. *The Arizona v. Anelich*, 298 U.S. 110 at 123; *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424 at 431; *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 380, 381; *Thurston v. U.S.* (9 C.CA.) 179 F.(2d) 514, 517.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for the writ of certiorari should be denied.

Respectfully submitted,

E. J. FRIEDMAN
Attorney for Respondent.